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UNIVERSITY SCHOOL OF
MEDICINE FOUNDATION,
EDUCATION INFORMATION
CONSULTANTS, INC.,
And EDUCATIONAL INTERNATIONAL
CONSULTANTS, LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ST. MATTHEW'S UNIVERSITY
(CAYMAN) LTD., a Cayman Islands
company,

) Case No.: CV-S-05-0848-RCJ (LRL)

Plaintiff,

**CONSOLIDATED REPLY OF
DEFENDANTS PANKAJ DESAI, M.D.,
SABA UNIVERSITY SCHOOL OF
MEDICINE FOUNDATION,
EDUCATION INFORMATION
CONSULTANTS, INC., AND
EDUCATIONAL INTERNATIONAL
CONSULTANTS, LLC. TO
PLAINTIFF'S CONSOLIDATED
OPPOSITION TO ITS
MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT**

SABA UNIVERSITY SCHOOL OF MEDICINE FOUNDATION, a Netherland-Antilles company; MEDICAL UNIVERSITY OF THE AMERICAS, a St. Kitts & Nevis company; EDUCATION INFORMATION CONSULTANTS, INC., a Massachusetts corporation; EDUCATIONAL INTERNATIONAL CONSULTANTS, LLC, a Massachusetts limited liability company; PATRICIA L. HOUGH, M.D., an individual, and d.b.a. "Saba University School of Medicine"; DAVID L. FREDRICK, an individual; PANKAJ DESAI, M.D., an individual; ASSOCIATION OF AMERICAN INTERNATIONAL MEDICAL GRAUDATES, INC., a Nevada corporation, a.k.a. "aaimg@yahoo.com"; THOMAS MOORE, M.D. a.k.a. "presaaimg@hotmail.com" and "crocdoc2004@netzero.net," an individual; SARAH B. WEINSTEIN a.k.a. "exeesecaaimg@hotmail.com"; an individual; RACHAEL E. SILVER, an individual; and DIEDRE MOORE, an individual.

Defendants.

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1 **CONSOLIDATED REPLY OF DEFENDANTS PANKAJ DESAI, M.D.,**
 2 **SABA UNIVERSITY SCHOOL OF MEDICINE FOUNDATION,**
 3 **EDUCATION INFORMATION CONSULTANTS, INC. AND**
 4 **EDUCATIONAL INTERNATIONAL CONSULTANTS, LLC TO**
 5 **PLAINTIFF'S CONSOLIDATED OPPOSITION TO ITS**
 6 **MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

7 Defendants Pankaj Desai, M.D. ("Desai"), SABA University School of Medicine
 8 Foundation ("SABA"), Education Information Consultants, Inc., and Educational International
 9 Consultants, LLC (collectively, "EIC") file this Memorandum in Reply to the Consolidated
 10 Opposition to the Motion to Dismiss Plaintiff's Amended Complaint filed by Plaintiff St.
 11 Matthew's University ("SMU"). Though these Defendants filed separate memoranda in support
 12 of their motions to dismiss, SMU filed a consolidated opposition which merges the Defendants
 13 and confuses the factual issues raised by each Defendant by implying that all facts relied on by
 14 SMU apply to each Defendant. Nevertheless, because they are responding to a consolidated
 15 brief, these Defendants, are filing this Consolidated Reply by which they address in separate
 16 sections the fact specific arguments applicable to each of them and address in the final two
 17 sections the issues common to them all.

18 **I. SUMMARY OF ARGUMENT**

19 SMU has failed to carry its burden of establishing that this Court has personal
 20 jurisdiction over Desai, SABA, or EIC. The unsworn allegations of the Amended Complaint and
 21 the documents relied on in SMU's Opposition do not in any way rebut the sworn denials of
 22 Desai, SABA, and EIC that they participated in any of the matters complained of in the

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1 Amended Complaint in Nevada or elsewhere, or that this Court can exercise general jurisdiction
 2 over them.¹

3 SMU failed to meet its burden of establishing that its service of process on SABA was
 4 sufficient.

5 SMU failed to meet its burden of establishing that Nevada is the appropriate venue for its
 6 claims against these Defendants.

7 SMU's Opposition also fails to establish its right to pursue its Second and Third Claims
 8 under the Lanham Act against any of the Defendants. As a foreign entity, SMU may only pursue
 9 a claim under the Lanham Act if it has such rights under a convention or treaty relating to unfair
 10 competition. Section 44 of the Lanham Act codifies Congress' determination that there is no
 11 reason for the United States to afford a citizen of a foreign country such rights if citizens of the
 12 United States are not accorded such rights by a treaty with that foreign country. SMU's
 13 Amended Complaint fails to allege and SMU has failed to put forward any such treaty, and for
 14 these reasons its Second and Third Claims must be dismissed.²

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17 . . .

18 ¹ On page 3, and again on page 5, of SMU's consolidated opposition, SMU claims that the Answer
 19 and Joinder to Motion to Dismiss the Amended Complaint Against Defendants Thomas Moore, M.D.,
 20 Sarah B. Weinstein, Rachael E. Silver, and Diedre Moore filed by Patricia L. Hough "has a significant
 21 impact on the present motions, in that it serves as Defendant Hough's claim and sworn statement that
 22 she possesses personal knowledge sufficient to admit or deny the acts of the Nevada Defendants...."
 23 This is an egregious overstatement that lacks any basis in the pleadings. Nothing in that document filed
 24 only on behalf of Hough applies to Desai, SABA, or EIC, and this Court should not in any way accept
 25 SMU's spurious contention that it does. That document addresses only the persons mentioned in it.
 Desai, SABA, and EIC are not mentioned in it, and they have denied under oath any involvement in
 the matters complained of by SMU, which of course includes involvement in any conduct complained
 of which refers to Hough, T. Moore, Weinstein, Silver and D. Moore. See also pp. 8-9, infra.

26 ² In its Opposition, SMU did not address the contention of Desai, SABA and EIC that SMU's Fifth
 27 and Sixth Claims fail to state a claim, claims for relief under the Nevada Deceptive Trade Act and the
 California Corporate Crimes Act, respectively. Desai, SABA, and EIC reiterate and incorporate the
 28 reasons set forth in their initial briefs in support of their motion to dismiss. See EIC Brief at 13-15,
 SABA Brief at 16-18; Desai Brief at 13-15.

1 **II. SMU HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT THIS**
 2 **COURT HAS PERSONAL JURISDICTION OVER DESAI, SABA AND EIC**

3 **A. Legal Issues Common To Personal Jurisdiction Issues Raised By Desai,**
 4 **SABA, And EIC.**

5 SMU claims that a sworn denial of the unsworn allegations of the Amended Complaint
 6 has no evidentiary weight and therefore claims that Desai, SABA and EIC must be assumed to
 7 have joined in the alleged conspiracy and must be assumed to have known “of the tortious acts of
 8 [the] alleged co-conspirators and the effects of such acts in the State of Nevada.”³ (Consolidated
 9 Opposition To Defendant Desai’s, SABA’s and EIC’s Motion to Dismiss (“SMU Opp.”) at 5-6,
 10 p. 9-10.) In making this argument, SMU’s Consolidated Opposition improperly and confusingly
 11 lumps all the Defendants together and relies on the groundless allegations of the unsworn
 12 complaint in an attempt to establish specific jurisdiction over Desai, SABA and EIC.

13 *SMU ignores that where defendants move to dismiss a complaint for lack of personal*
 14 *jurisdiction the plaintiff bears the burden of demonstrating that jurisdiction is appropriate as to*
 15 *each defendant. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004);*
 16 *Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir.1990). The plaintiff cannot “simply rest on the*
 17 *bare allegations of its complaint.” Schwarzenegger, 374 F.3d at 800; Amber Marketing Systems,*
 18 *Inc. v. Jobar Intern., Inc., 551 F.2d 784, 787 (9th Cir.1977).*

20 It is not the law that the Amended Complaint must be accepted as true. It is only the law
 21 that uncontroverted allegations of the Amended Complaint may be taken as true.

23 Schwarzenegger, 374 F.3d at 800; American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert,
 24 94 F.3d 586, 588 (9th Cir.1996). Desai, SABA, and EIC have categorically denied under oath
 25 that they caused SMU any injury in Nevada or anywhere else or that they conspired with Patricia
 26 L. Hough (“Hough”) or anyone else in connection with the alleged conspiratorial activities in

28 ³ SMU makes this argument, which it made in its prior consolidated opposition, by referring the Court
 29 to pages 3-11 of its opposition to Fredrick’s Motion to Dismiss.

1 Nevada or elsewhere. (Affidavit of David L. Fredrick, President of SABA ("SABA Aff.")
 2 ¶¶ 4-9; Affidavit of Pankaj Desai ("Desai Aff.") ¶¶ 4-7; Affidavit of David L. Fredrick, Manager
 3 of EIC ("EIC Aff.") ¶¶ 4-9). There is absolutely no evidence that Desai, SABA, or EIC had any
 4 involvement with the formation of AAIMG - the only contact which this case has with Nevada -
 5 and each has denied under oath any involvement with AAIMG or its activities. (SABA Aff. at ¶
 6 7; EIC Aff. at ¶ 6; Desai Aff. at ¶ 5.)

7 SMU has not submitted any sworn evidence to meet its burden of establishing specific
 8 jurisdiction over Desai, SABA, and EIC in Nevada. Its unsworn complaint does not suffice to
 9 establish jurisdiction where, as here, it is controverted by sworn evidence, and the Motions of
 10 Desai, SABA and EIC should be granted. Tomlinson v. H&R Block, Inc., 151 Fed. Appx. 655,
 11 657 (10th Cir. 2005) ("The allegations in the complaint must be taken as true to the extent they
 12 are uncontested by the defendant's affidavits.") See also Williams v. Bowman Livestock
 13 Equipment. Co., 927 F.2d 1128, 1130-31 (10th Cir. 1991).

14 **B. Personal Jurisdiction Issues Specific To Desai**

15 In response to Desai's sworn denial, SMU contends that Exhibits A and D to its
 16 Opposition establish that Desai logged into the AAIMG website on two occasions. Desai's
 17 sworn affidavit denies that he participated in any way in any activities related to AAIMG.
 18 (Desai Aff. ¶¶ 4-7.) That someone logged into the AAIMG web site from an account in Desai's
 19 name does not establish that Desai personally had any contacts with AAIMG or with Nevada,
 20 either specifically with respect to this litigation or generally, both of which Desai denies. (Id.)
 21 Whoever made the September 17 and 18, 2004 contacts actually doesn't matter, as neither were
 22 with or into Nevada. By its own Amended Complaint, SMU acknowledges that the AAIMG
 23 website is not in Nevada. Rather, it is hosted in Russia and has a California e-mail address.
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1 (Amended Complaint ¶ 6 and page 15 n.7.) There is no basis whatsoever for jurisdiction over
 2 Desai.

3 **C. Personal Jurisdiction Issues Specific To SABA**

4 SMU's unfounded claim that SABA allegedly logged into the AAIMG website through
 5 an ISP account it owned is inconsequential. (SMU Opposition at 10; Ex. C to March 6, 2006
 6 Opposition of SMU.) First, the sworn affidavit submitted on SABA's behalf denies that it
 7 participated in any way in any activities related to AAIMG. (SABA Aff. ¶¶ 4-9.) Second, even
 8 if someone logged into the AAIMG web site from an account in SABA's name, this does not
 9 establish that such person was authorized by or acted for SABA or that SABA had any contacts
 10 with AAIMG or with Nevada, either specifically with respect to this litigation or generally,
 11 which facts SABA denies. (Id.) Moreover, even assuming that the contacts were by SABA,
 12 those contacts were not with or into Nevada. By its own Amended Complaint, SMU
 13 acknowledges that the AAIMG website is not in Nevada. Rather, it is hosted in Russia and has a
 14 California e-mail address. (Amended Complaint ¶ 6 and page 15 n.7.) Thus, SMU has
 15 introduced no evidence to establish specific jurisdiction over SABA.

16 Unable to establish specific jurisdiction over SABA- i.e., that SABA participated in or
 17 had knowledge of any activities alleged in the Amended Complaint or that it acted in furtherance
 18 of those activities in Nevada or elsewhere, SMU seeks to establish general jurisdiction over
 19 SABA. General jurisdiction applies where a defendant is held to answer in a forum for causes of
 20 action unrelated to forum activities. Baker v. Eighth Judicial District Court ex rel. County of
 21 Clark, 116 Nev. 527, 532 (2000); Trump v. Eighth Judicial District Court of State of Nev. In and
 22 For County of Clark, 109 Nev. 687, 699 (1993). General jurisdiction over a nonresident will
 23 only lie where the nonresident's activities in the forum are "substantial" or "continuous and
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1 systematic." Baker, 116 Nev. at 532; Trump, 109 Nev. at 699. There is no proof of such
 2 conduct by SABA.

3 SMU claims this Court can exercise general jurisdiction over SABA because it allegedly
 4 advertises throughout the United States, including Nevada, to potential medical students and to
 5 pre-med advisors. (SMU Opposition at 9.) However, SMU has offered no evidence as to any
 6 advertising by SABA in Nevada. Its argument is thus based on pure conjecture, and SMU
 7 cannot rely on this claim to establish jurisdiction.
 8

9 SMU next contends, again without any evidence, that SABA placed former students into
 10 residency programs in hospitals in Nevada. (SMU Opposition at 9 and Ex. F.) However, Exhibit
 11 F, relied upon by SMU, only shows that a few former SABA students were employed as
 12 residents in hospitals in Nevada after their graduation from SABA. Residency programs are
 13 operated by hospitals, not by SABA. (Ex. A to Affidavit of Vincent O'Rourke, filed herewith.)
 14 Thus, the fact that a few graduates of SABA are residents in Nevada does not establish contacts
 15 by SABA with Nevada.
 16

17 **D. Personal Jurisdiction Issues Specific To EIC**

18 In its effort to establish specific jurisdiction, SMU claims that EIC, as an alleged agent of
 19 SABA, allegedly logged into the AAIMG website through an ISP account in SABA's name.
 20 (SMU Opposition at 10; Ex. C to March 6, 2006 Opposition.) First, the sworn affidavit
 21 submitted on EIC's behalf denies that EIC participated in any way in any activities related to
 22 AAIMG. (EIC Aff. ¶¶ 4-9.) Second, that someone logged into the AAIMG web site from an
 23 account in SABA's name does not establish that such person was authorized by or acted for EIC
 24 or that EIC had any contacts with AAIMG or with Nevada, either specifically with respect to this
 25 litigation or generally, and EIC denies such actions. (Id.) Even assuming that the contacts were
 26 by EIC, those contacts were not with or into Nevada. By its own Amended Complaint, SMU
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1 acknowledges that the AAIMG website is not in Nevada. Rather, it is hosted in Russia and has a
 2 California e-mail address. (Amended Complaint ¶ 6 and page 15 n.7.)

3 Unable to establish specific jurisdiction over EIC- i.e., that EIC participated in or had
 4 knowledge of any activities alleged in the Amended Complaint or that it acted in furtherance of
 5 those activities in Nevada or elsewhere, SMU seeks to establish general jurisdiction over EIC.
 6

7 The Amended Complaint alleges that this Court has personal jurisdiction over SABA and
 8 EIC because they allegedly conducted business in Nevada under the guise of AAIMG, Moore,
 9 Weinstein or Silver (Amended Complaint ¶ 6). This allegation has been denied under oath by
 10 both SABA and EIC. (SABA Aff. ¶¶ 7-9; EIC Aff. ¶¶ 6-9.) SMU now claims this Court can
 11 exercise general jurisdiction over EIC because it is allegedly an agent of SABA and because
 12 SABA allegedly advertises throughout the United States, including Nevada, to potential medical
 13 students and to pre-med advisors. (SMU Opposition at 9.) However, SMU has offered no
 14 evidence as to such advertisements either on EIC's own behalf or as SABA's agent, in Nevada or
 15 elsewhere. SMU's argument is thus based on pure conjecture, and SMU cannot rely on this
 16 claim to establish jurisdiction in the face of EIC's sworn denials.
 17

18 SMU next contends, again without any evidence, that SABA, and hence EIC as its agent,
 19 placed former students into residency programs in hospitals in Nevada. (SMU Opposition at 9
 20 and Ex. F.) However, Exhibit F, relied upon by SMU, only shows that a few former SABA
 21 students were employed as residents in hospitals in Nevada. Residency programs are run by
 22 hospitals not SABA. (Ex. A to Affidavit of Vincent O'Rourke, filed herewith.) The fact that a
 23 few graduates of SABA are residents in Nevada does not establish contacts by EIC with Nevada.
 24

25 III. SMU'S SERVICE UPON SABA WAS INSUFFICIENT

26 Citing Fed.R.Civ.P. 4(h)(1), SMU contends that it effected service "by delivering a copy
 27 of the summons and of the complaint to an officer, a managing or general agent...." SMU then
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1 argues that it met this requirement by serving Desai who is on SABA's board of trustees and is
 2 allegedly a dean of the school. (SMU Opposition at 19.) The document relied on by SMU does
 3 not support a claim that Desai is a dean of SABA and the sworn affidavit filed by its President on
 4 behalf of SABA establishes that Desai is not an officer, managing or general agent of SABA and
 5 "is not authorized to accept service for SABA." (SABA Aff. ¶ 5.) Thus, SMU failed to establish
 6 sufficient service of process on SABA.
 7

IV. SMU'S SERVICE UPON SABA WAS INSUFFICIENT

8 As it did in connection with personal jurisdiction, SMU claims venue is appropriate in
 9 light of Hough's alleged answer "in place of the Nevada Defendants," which according to SMU
 10 establishes that a "substantial part" of the acts giving rise to the Amended Complaint occurred in
 11 or were directed toward Nevada. (SMU Opposition at 10-12.) Contrary to SMU's contention,
 12 Hough has not stated that she should answer for the actions of the so-called Nevada Defendants.
 13 Rather, Hough's pleading stated:
 14

15 The Amended Complaint alleges, inter alia, that Defendants
 16 Thomas Moore, M.D., Sarah B. Weinstein, Rachel E. Silver and
 17 Diedre Moore are false identities used by Defendant Patricia L.
 18 Hough, M.D ("Hough") and others. In light of this allegation, the
 19 undersigned, who appears as counsel for Defendant Hough adopts
 20 the Answer of Hough to the Amended Complaint and the Motion
 21 of Hough to Dismiss the Second, Third, Fifth and Sixth Claims of
 22 the Amended Complaint as Hough's Response to the Amended
 23 Complaint against said Defendants Thomas Moore, M.D., Sarah B.
 24 Weinstein, Rachel E. Silver and Diedre Moore.
 25

26 Thus, Hough did not file an answer on behalf of the so-called Nevada Defendants. Even if she
 27 did, however, that would have no bearing on SABA since she did not answer for SABA, EIC or
 28 Desai or purport to do so.

29 SMU erroneously claims that venue is appropriate because it allegedly suffered injury in
 30 Nevada. (Consolidated Opposition at 11.) The Amended Complaint alleges one act that
 31 occurred in the State of Nevada - the formation of AAIMG. The Amended Complaint does not
 32

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1 claim that any of the statements on the AAIMG website or made in the AAIMG e-mails which
 2 are claimed to have caused SMU injury have anything to do with Nevada. Rather, it alleges that
 3 the offending website was hosted in Russia (Amended Complaint ¶ 6) and that the offending e-
 4 mails emanated from servers hosted in California. (Amended Complaint p.15 n.7.) Thus, the
 5 Amended Complaint, on its face, makes it abundantly clear that Nevada is not “a judicial district
 6 in which a substantial part of the events or omissions giving rise to the claim occurred.” 28
 7 U.S.C. 1391(b)(2).
 8

9 In Myers v. Bennett Law Offices, 238 F.3d 1068 (9th Cir. 2001), the Ninth Circuit
 10 recognized that in construing 28 U.S.C. 1391(b)(2), the “substantiality of the operative events is
 11 determined by assessment of the ramifications for efficient conduct of the suit,” Myers v.
 12 Bennett Law Offices, 238 F.3d at 1075 (quoting Lamont v. Haig, 590 F. 2d 1124, 1134-35 (D.C.
 13 Cir. 1978)), and that in a tort action it is relevant to look to the place at which the harms were
 14 allegedly suffered by the Plaintiff in determining where a substantial part of the events giving
 15 rise to the claim occurred. Id. at 1076. Based upon SMU’s theory of the case, the only place in
 16 the United States where SMU would have suffered damages from this tortious conduct would be
 17 in connection with its student programs in Maine (see Exhibit A, attached to Affidavit of
 18 Vincent F. O’Rourke, Jr.), where a separate action is currently pending between Fredrick and
 19 SMU. David L. Fredrick v. St. Matthews University, U.S.D.C. Maine, No. 06-CV-00052-DBH.
 20 Moreover, it would be far more judicially efficient to venue this action in either Maine, where
 21 SMU theoretically has suffered its damages, or Massachusetts, where SMU now claims many
 22 operative activities occurred. Both of these jurisdictions would be far more efficient from the
 23 point of view of witnesses and documentary evidence than Nevada, which has little or no contact
 24 with the action, the witnesses or the damages alleged. See Core-Vent Corp. v. Nobel Industries
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1 AB, 11 F.3d 1482, 1486 (9th Cir. 1993). (No personal jurisdiction in California over enterprise
 2 with worldwide market and no activities directed at California or its residents.)

3 **THIS COURT MUST DISMISS COUNTS II AND III OF PLAINTIFF'S
 4 AMENDED COMPLAINT BECAUSE PLAINTIFF, AS A FOREIGN NATIONAL,
 5 COULD ONLY BRING A LANHAM ACT CLAIM UNDER 15 U.S.C. § 1126,
 WHICH IT ADMITTEDLY HAS NOT DONE.**

6 SMU is a foreign national, incorporated in the Cayman Islands. (Amended Complaint
 7 ¶ 3a.) Contrary to SMU's contention, SMU may only proceed under Section 1126 (b) and (h) of
 8 the Lanham Act,⁴ pursuant to which Congress provided a cause of action for foreign nationals.
 9 Sections 1126 (b) and (h) extend the protections and remedies of the Lanham Act for unfair
 10 competition only to a foreign national whose "country of origin is a party to any convention or
 11 treaty relating to ... unfair competition, to which the United States is also a party, or extends
 12 reciprocal rights to nationals of the United States by law." 15 U.S.C. § 1126 (b). In Larsen v.
 13 Terk Technologies Corp., 151 F.3d 140, 145-46 (4th Cir. 1998), the United States Court of
 14 Appeals for the Fourth Circuit ruled that Section 44 of the Lanham Act, 15 U.S.C. §1126:
 15

16 extends the protections and remedies of the Lanham Act to any
 17 foreign national whose 'country of origin is a party to any convention
 18 or treaty relating to trademarks, trade or commercial names, or the
 19 repression of unfair competition, to which the United States is also a
 20 party, or extends reciprocal rights to nationals of the United States by
 21 law.' 15 U.S.C. § 1126(b), (g), (h). Larsen is entitled to the
 22 protections and remedies of the Lanham Act because Denmark and
 23 the United States are both parties to the International Convention for
 24 the Protection of Industrial Property of 1883 (the Paris Convention),
 25 *opened for signature* Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as
 26 amended at Stockholm, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No.
 27 6923. See 4 J. Thomas McCarthy, McCarthy on Trademarks and
 28 Unfair Competition § 29:21, at 29-46, 29-49 (4th ed.1998).

26 ⁴ 15 U.S.C. § 1126, also referenced as Section 44 of the Lanham Act, provides that "[a]ny person
 27 whose country of origin is a party to the convention ... shall be entitled to benefits [under § 1126] to the
 extent necessary to give effect to any provision of such convention ..." 15 U.S.C. § 1126(b). 15
 28 U.S.C. § 1126(h) provides that any person covered by § 1126(b) "shall be entitled to effective
 protection against unfair competition, and the remedies ... shall be available so far as they may be
 appropriate in repressing acts of unfair competition."

1 See also Scotch Whiskey Ass'n v. Majestic Distilling Co., 958 F.2d 594, 597 (4th Cir.
 2 1992)(Section 1126(b) of the Lanham Act gives those persons whose country of origin is a party
 3 to a treaty relating to unfair competition those benefits of Section 1126 necessary to give effect
 4 to the Treaty).

5 15 U.S.C. § 1126(h) is intended to provide Lanham Act protection only to a foreign
 6 national whose country of origin is party to any convention or treaty relating to the repression of
 7 unfair competition and who meets the other requirements set forth in section 1126(b). Larsen,
 8 151 F.3d at 145-46; Pagliero v. Wallace China Co., 198 F.2d 339 (9th Cir. 1952); Stauffer v.
 9 Exley, 184 F.2d 962 (9th Cir. 1950). After analyzing the legislative history of Section 1126, the
 10 United States Court of Appeals for the Third Circuit concluded that the statute clearly limited
 11 the circumstances under which a foreign national could bring a Lanham Act claim: “[T]here
 12 [would be] no need for such a limited declaration of jurisdiction over unfair competition [claims
 13 by foreign nationals] if the Lanham Act had covered … countless other [situations] in a much
 14 broader grant of jurisdiction over all unfair competition in commerce.” L'Aiglon Apparel v.
 15 Lana Lobell, Inc., 214 F.2d 649, 654 (3rd Cir. 1954).⁵

16 Although SMU is a foreign national, SMU acknowledges that it has not alleged a cause
 17 of action under 15 U.S.C. §§ 1126(b) and (h). (SMU Opp. at 16.) (“Importantly, nowhere has
 18 the Plaintiff alleged any cause of action under 15 U.S.C. § 1126 as Defendants state and argue in
 19 their Motions.”) Because SMU’s only potential cause of action under the Lanham Act is under
 20 Section 1126, Counts II and III should be dismissed.

21 Having admitted it did not file an action under 15 U.S.C. § 1126, SMU attempts to avoid
 22 dismissal by arguing that a foreign national can bring a Lanham Act claim under Section 1125
 23 because, by its terms, “any person” can bring an action under that statute. (SMU Opp. at 13.)

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 28 ⁵ The legislative history of the Lanham Act is set out in detail in L'Aiglon Apparel v. Lana Lobell, Inc., 214 F.2d 649, 654 (3rd Cir. 1954).

1 This argument, however, ignores the definition of "person" set forth in 15 U.S.C. § 1127, which
 2 does not include foreign nationals:

3 The term "person" and any other word or term used to designate
 4 the applicant or other entitled to a benefit or privilege or rendered
 5 liable under the provisions of this Act includes a juristic person as
 6 well as a natural person. The term "juristic person" includes a
 7 firm, corporation, union, association, or other organization capable
 8 of suing or being sued in a court of law. (Emphasis added.)

9 Thus, the definition of person is limited to those entitled to "a benefit or privilege under
 10 the Act." This definition must be read in conjunction with Section 1126 which defines the scope
 11 of that privilege and establishes that a foreign national like SMU may only bring an action for
 12 unfair competition if it meets the prerequisites of Section 1126(b) and (h). SMU does not meet
 13 those prerequisites because there is no applicable Cayman Island treaty. Therefore SMU is not a
 14 "person" under the Act and Section 1125 is not applicable. SMU's construction of the Lanham
 15 Act which would provide unlimited rights under the Lanham Act to foreign corporations makes
 16 Section 1126(b) and (h) totally superfluous and such a statutory construction violates the
 17 requirement that a statute must be construed to give meaning to all its provisions. Commissioner
 18 of Internal Revenue v. Ewing, 439 F.3d 1009, 1014 (9th Cir. 2006).⁶

19 Finally, SMU inaccurately contends that courts have uniformly held that foreign
 20 nationals can bring actions under Section 1125. (SMU Opp. at 14.) The cases relied upon by
 21 SMU do not support its position. SMU first cites the case of Noone v. Banner Talent Associates,
 22 Inc., 398 F.Supp. 260 (S.D.N.Y. 1975), in which the court inferentially rejected SMU's
 23 contention. In response to plaintiff's argument that he could bring an action under Section
 24

25
 26 ⁶ SMU also argues that pursuant to 15 U.S.C. §1121(a) the district courts have original jurisdiction
 27 over causes of action under the Lanham Act regardless of the citizenship of the parties, and, therefore,
 28 this establishes that a foreign national can bring an action. This argument lacks merit because this
 29 statute merely establishes that a claim under the Lanham Act can be brought in federal district court, if
 30 properly pled, based on federal question jurisdiction, regardless of diversity of citizenship. This statute
 31 does not expand the substantive scope of the causes of action under the Lanham Act and does not
 32 provide SMU with a cause of action.

1 43(a)[15 U.S.C. § 1125(a)], the defendant argued that the action had to be brought, if at all,
 2 under Section 44(b)[15 U.S.C. § 1126(b)]. The District Court avoided ruling on the issue and
 3 permitted the matter to go forward by ruling: “that although plaintiff frames his claim for relief
 4 pursuant to Section 43(a), I would find that the facts would clearly support a claim for relief
 5 pursuant to Section 44(b).” 398 F. Supp. at 262. (Emphasis added.)
 6

7 L'Aiglon Apparel, *supra*, 214 F.2d 649, relied on by SMU, in fact supports the
 8 Defendants' argument. The L'Aiglon Court addressed in detail the legislative history of Section
 9 1126 and correctly concluded that Section 1126 expressly limits the claims that can be made by a
 10 foreign national. 214 F.2d at 654. Indeed, as the Court stated, Section 1126 would not exist if
 11 Congress intended to give foreign nationals a plenary right to sue under the Lanham Act. Id.
 12 L'Aiglon did not and could not in light of its analysis conclude that a foreign national can sue
 13 under Section 1125. Id.

14 Scotch Whiskey Ass'n v. Barton Distilling Co., 338 F.Supp. 595 (N.D. Ill. 1971), also
 15 does not support SMU. The Scotch Whiskey Court failed to address, much less resolve, the
 16 issue of whether SMU can bring an action under Section 1125 or is limited to an action under
 17 Section 1126. Although the Court ruled that the Plaintiff could bring an action under Section
 18 1125(a), it did so without any analysis and also ruled that Plaintiff stated a claim under Section
 19 1126 and in fact exercised jurisdiction under Section 1126. The Court held, among other things:
 20

21 4. This court has jurisdiction of plaintiffs' claim under the
 22 Convention of Paris for the Protection of Industrial Property, as
 23 implemented by 15 U.S.C. 1126(b), since plaintiffs' claim arises
 24 under the Trademark Laws, with jurisdiction being conferred by 15
 25 U.S.C. 1121 and 28 U.S.C. 1338(a).

26 5. The court has jurisdiction of plaintiffs' claim under the
 27 Convention of Paris for the Protection of Industrial Property, since
 28 plaintiffs' claim arises under a treaty of the United States and the
 29 value of the matter in controversy is in excess of \$10,000, exclusive
 30 of interest and costs, with jurisdiction being conferred by 28 U.S.C.
 31 1331.

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1 338 F. Supp. at 598-99. (Emphasis added.)

2 SMU's reliance on Spartan Chemical Co. v. ATM Enterprises of America, (Exhibit F to
 3 SMU Opp.), is also misplaced. While that Court stated that a foreign national could bring an
 4 action under Section 1125, there is no indication that the defendant in Spartan Chemical raised
 5 the issue of the limitations on foreign nationals established by Section 1126(b) and the Spartan
 6 Chemical Court did not address the issue. The Court's sole reliance for the proposition that an
 7 action could be brought under Section 1125 was Noone, supra, which, as discussed above,
 8 avoided addressing the issue presented here because the Court found that Noone had stated a
 9 claim under Section 1126(b).

10 None of the remaining cases cited by SMU ever mentioned, let alone addressed, Section
 11 1126, and the limitations imposed by that statute on actions brought by foreign nationals.
 12 Johnson & Johnson v. Carter-Wallace Inc., 631 F.2d 186 (2d Cir. 1980); West Indian Sea Island
 13 Cotton Ass'n Inc. v. Threadtex, Inc., 761 F.Supp. 1041 (S.D.N.Y. 1991); Menendez v. Faber,
 14 Coe, & Gregg Inc., 345 F.Supp. 527 (S.D.N.Y. 1972).

17 CONCLUSION

18 The Amended Complaint in this matter against SABA , EIC and Desai should be
 19 dismissed pursuant to Fed.R.Civ.P. 12 (b)(2) and Fed.R.Civ.P. 12 (b)(3) because this Court lacks
 20 personal jurisdiction over them, and venue is not proper with respect to the claims against them.
 21 Moreover, SABA has never been properly served. Alternatively, the Amended Complaint fails
 22

23 ...

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1 to state claims upon which relief can be granted in its Second, Third, Fifth and Sixth Claims and
2 those Claims must be dismissed if this Court retains jurisdiction over the claims against any of
3 Defendants.

4 DATED this 4th day of May, 2006.

5
6 ALVERSON, TAYLOR,
7 MORTENSEN & SANDERS
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UNIVERSITY SCHOOL OF
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CONSULTANTS, INC.,
And EDUCATIONAL INTERNATIONAL
CONSULTANTS, LLC~~

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CERTIFICATE OF MAILING

I hereby certify that on this 4 day of May, 2006, I did deposit in the United States Post Office, with postage fully prepaid thereon, a copy of the above and foregoing

CONSOLIDATED REPLY OF DEFENDANTS PANKAJ DESAI, M.D., SABA

UNIVERSITY SCHOOL OF MEDICINE FOUNDATION, EDUCATION

INFORMATION CONSULTANTS, INC. AND EDUCATIONAL INTERNATIONAL

CONSULTANTS, LLC, TO PLAINTIFF'S CONSOLIDATED OPPOSITION TO ITS

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT addressed to:

Mark G. Tratos, Esq.
F. Christopher Austin, Esq.
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KRONENBERGER & ASSOCIATES
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Attorney for Plaintiff

An Employee of ALVERSON, TAYLOR,
MORTENSEN & SANDERS

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Exhibit "A"

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ST. MATTHEW'S UNIVERSITY)	Case No.: CV-S-05-0848-RCJ(LRL)
(CAYMAN) LTD., a Cayman Islands company,)	
)	
Plaintiff,)	
)	
vs.)	
)	
SABA UNIVERSITY SCHOOL OF)	
MEDICINE FOUNDATION, a Netherland-)	
Antilles company; MEDICAL UNIVERSITY)	
OF THE AMERICAS, a St. Kitts & Nevis)	
company; EDUCATION INFORMATION)	
CONSULTANTS, INC., a Massachusetts)	
corporation; EDUCATIONAL INTERNATIONAL)	
CONSULTANTS, LLC, a Massachusetts)	
limited liability company; PATRICIA L. HOUGH,)	
M.D. an individual, and d.b.a. "Saba University)	
School of Medicine"; DAVID L. FREDRICK, an)	
individual; PANKAJ DESAI, M.D., an individual;)	
ASSOCIATION OF AMERICAN)	
INTERNATIONAL MEDICAL GRADUATES,)	
INC., a Nevada corporation, a.k.a.)	
"aaimg@yahoo.com"; THOMAS MOORE, M.D.)	
a.k.a. "presaaimg@hotmail.com" and)	
"croedoc2004@netzero.net," an individual;)	
SARAH B. WEINSTEIN a.k.a.)	
"execsecaaimg@hotmail.com," an individual;)	
RACHAEL E. SILVER, an individual; and)	
DIEDRE MOORE, an individual,)	
)	
Defendants.)	

AFFIDAVIT OF VINCENT F. O'ROURKE, JR.

I, Vincent F. O'Rourke, Jr., being sworn under oath depose and state as follows:

1. I am an attorney licensed to practice in the Commonwealth of Massachusetts.

2. I represent the defendants SABA University School of Medicine Foundation, Education Information Consultants, Inc., Educational International Consultants, LLC and Pankaj Desai, M.D.

3. Attached hereto as Exhibit A are true and accurate copies of pages which appeared on the website of Defendant SABA University School of Medicine on April 26, 2006.

Signed under the pains and penalties of perjury this 4th day of May, 2006.

Vincent F. O'Rourke, Jr.
Vincent F. O'Rourke, Jr.

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

On this 4th day of May 2006, before me, the undersigned notary public, personally appeared Vincent F. O'Rourke, Jr., proved to me through satisfactory evidence of identification, which was photographic identification with signature issued by a federal or state governmental agency, oath or affirmation of a credible witness, personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document(s), and acknowledged to me that he signed it voluntarily for its stated purpose.

Vincent F. O'Rourke, Jr. (official seal)
Notary Public
My commission expires 7/27/07

EXHIBIT

A

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SABA UNIVERSITY

SCHOOL OF MEDICINE

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<u>SABA Marine Park Hyperbaric Facility</u>	<u>Master of Science/Hyperbaric Medicine</u>	<u>Hyperbaric Medicine Curriculum</u>
<u>Graduate Course Descriptions</u>	<u>The Institutional Review Board For Human Subjects</u>	<u>Institute for Graduate Studies and Research</u>
<u>The Research Committee</u>		

HOSPITAL AFFILIATIONS

Hospital affiliations in the United States are divided into major geographic areas: East coast, Southeast, Mid-west and West. Although 95% of all SABA University students complete their clinical rotations in the United States, rotations outside the United States are also available. SABA University graduates have participated in rotations in Great Britain, Ireland, Israel, Canada, Australia, India and The Netherlands-Antilles. SABA University students have also done elective rotations with voluntary groups in Africa, Central America and Bosnia.

The following is a partial list of major affiliated hospitals in the United States where SABA University students regularly do rotations:

- [Harbor Hospital Center, Baltimore, MD](#)
- [Union Memorial Hospital, Baltimore, MD](#)
- [Spring Grove Hospital, Catonsville, MD](#)
- [Holy Cross Hospital, Silver Springs, MD](#)
- [Brookdale Hospital, NY](#)
- [Peninsula General Hospital, NY](#)
- [Bridgeport Hospital, Bridgeport, CT](#)
- [Cape Cod Hospital, Hyannis, MA](#)
- [Jackson Park Hospital, Chicago, IL](#)
- [St. Anthony Medical Center, Chicago, IL](#)
- [St. Luke's Hospital, Kansas City, MO](#)
- [St. Mary's Health Center, St. Louis, MO](#)
- [Leonard J. Chabert Hospital, LA](#)
- [Cherry Hospital, Goldsboro, NC](#)
- [Michael Reese Hospital, Chicago, IL](#)
- [St. Mary's Hospital, Waterbury, CT](#)
- [Lincoln Medical and Mental Health Center, Bronx, NY](#)



- Sheppard Pratt Health System, Baltimore, MD
- St. Anthony Hospital, Chicago, IL

POST GRADUATE RESIDENCY TRAINING

The staff at SABA University School of Medicine takes special pride in mentoring students for residency positions in the United States and other countries. Students become eligible for the National Resident Matching Program in the United States by passing Steps I and II of the USMLE, the CSA exam and the TOEFL. Each student is given individual attention and guidance throughout their application process. Personal statements are reviewed and a comprehensive Dean's Letter is written for residency training directors. Click here to see a list of SABA University graduates and their residency placements.



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The Current Date Is Wednesday April 26,2006
The Current Time Is 08:32AM EDT

All information is deemed reliable but is not guaranteed and should be verified by the viewer.
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